Supreme Court, U.S.
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No. 10-

IN THE
SUPREME COURT OF THE UNITED STATES

LOUISE ROOT,

Petitioner,

v.

COUNTY OF FAIRFAX, PAMEAL SCHMOLL, MICHEL BODART, SUE GILBERT & JOHN COLWELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. GARDINER*
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
(703) 352-7276
regardiner@cox.net
Counsel for Petitioner
**Counsel of Record*

QUESTION PRESENTED

Whether Root was deprived of her property without due process in violation of the Fourteenth Amendment, when, after the County had initiated the civil proceeding established by state law seeking the forfeiture of Root's property, the County non-suited (voluntarily dismissed) that proceeding but did not return her property.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of Count II of Root's complaint, and affirming the remand to the state court of Count I, is not published and is reprinted in the Appendix ("App.") at App. 1a. The Order of the district court is not published and is reprinted in the Appendix at App. 9a. The transcript of the district court's oral decision is reprinted in the Appendix at App. 12a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court dismissing Count II of Root's complaint and remanding Count I to the state court in an unpublished decision on March 26, 2010. App. 1a. A timely filed petition for rehearing was denied on April 10, 2008. App. 10a. On July 20, 2010, Chief Justice Roberts granted Root's timely motion to extend the time to file this petition until September 23, 2010. This Court has jurisdiction under 28 U.S.C.§ 1254(l).

CONSTITUTIONAL PROVISION

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const., Fourteenth Amendment, § 1.

STATUTE

A. Any humane investigator, law-enforcement officer or animal control officer may lawfully seize and impound any animal that has been abandoned, has been cruelly treated, or is suffering from an apparent violation of this chapter that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health. . . .

Upon seizing or impounding an animal, the humane investigator, law-enforcement officer or animal control officer shall petition the general district court in the city or county wherein the animal is seized for a hearing. The hearing shall be not more than ten business days from the date of the seizure of the animal. The hearing shall be to determine whether the animal has been abandoned, has been cruelly treated, or has not been provided adequate care.

B. The humane investigator, law-enforcement officer, or animal control officer shall cause to be served upon the person with a right of property in the animal or the custodian of the animal notice of the hearing. If such person or the custodian is known and residing

within the jurisdiction wherein the animal is seized, written notice shall be given at least five days prior to the hearing of the time and place of the hearing. . . .

C. The procedure for appeal and trial shall be the same as provided by law for misdemeanors. Trial by jury shall be as provided in Article 4 (§ 19.2-260 et seq.) of Chapter 15 of Title 19.2. The Commonwealth shall be required to prove its case beyond a reasonable doubt.

D. The humane investigator, law-enforcement officer, or animal control officer shall provide for such animal until the court has concluded the hearing. . . .

If the court determines that the animal has been neither abandoned, cruelly treated, nor deprived of adequate care, the animal shall be returned to the owner. If the court determines that the animal has been (i) abandoned or cruelly treated, (ii) deprived of adequate care, as that term is defined in § 3.1-796.66, or (iii) raised as a dog that has been, is, or is intended to be used in dogfighting in violation of § 3.1-796.124, then the court shall order that the animal be: (a) sold by a local governing body; (b) humanely destroyed, or disposed of by sale or gift to a federal agency, state-supported

> institution, agency of the Commonwealth, agency of another state, or a licensed federal dealer having its principal place of business located within the Commonwealth; (c) delivered to any local humane society or shelter, or to any person who is a resident of the county or city where the animal is seized or an adjacent county or city in the Commonwealth and who will pay the required license fee, if any, on such animal; or (d) delivered to the person with a right of property in the animal as provided in subsection E.

Virginia Code § 3.1-796.115

STATEMENT OF THE CASE

Facts

On December 13, 2004, pursuant to Virginia Code § 3.1-796.115(A), Fairfax County Police Department Animal Control officers seized all seventeen (17) of Root's dogs[1] because they had allegedly been "rendered . . . in such a condition as to constitute a direct and immediate threat to [their] life, safety or health" and petitioned the Fairfax County General District Court, pursuant to the same Code

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[1] Root's possession of seventeen (17) dogs was lawful.

provision, for a hearing.[2]

On December 15, 2004, again pursuant to Virginia Code § 3.1-796.115(A), Fairfax County Police Department Animal Control officers seized one (1) horse from Root because it had allegedly been "rendered . . . in such a condition as to constitute a direct and immediate threat to its life, safety or health" and petitioned the Fairfax County General District Court, pursuant to the same Code provision, for a hearing.

On December 22, 2004, the Fairfax County General District Court ordered, *inter alia*, that seven (7) of the dogs be returned to Root, that nine (9) dogs and the horse be "made available for adoption immediately."[3] The order was entered on January 4, 2005, to be vacated as of December 15, 2005. The matter was continued to January 19, 2005 for the court to determine, *inter alia*, "if progress has been made with the adoptions . . . ."[4]

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[2] Because Virginia law "regards animals, however beloved, as personal property," *Kondaurov v. Kerdasha*, 271 Va. 646, 657, 629 S.E.2d 181, ___ (2006), Code § 3.1-796.115 is in the nature of a forfeiture proceeding. "[F]orfeiture is appropriate to afford the Commonwealth relief against 'property employed in defiance of the laws of the State.'" *Jenkins v. Commonwealth*, 13 Va. App. 420, 422, 411 S.E.2d 841, ___ (1991).

[3] Root filed a motion for stay on January 3, 2005, on which the general district court did not act.

[4] On January 19, 2005, the court ordered that one (1) dog be euthanized. The euthanization was carried out on January 20, 2005.

On February 22, 2006, the Fairfax County General District Court entered a final order in the case, which reiterated the actions taken by the court previously pursuant to the vacated order, and which barred Root "from adopting or purchasing any further animals for a period of one year." The Order also stated that, "[a]t the expiration of one year from the date of this Order, the, provisions of this Order shall lapse."

Pursuant to Virginia Code § 3.1-796.115(C), a timely appeal was taken to the Fairfax County Circuit Court for a trial *de novo*.[5] A bench trial was held in the circuit court on July 6, 2006, at which the circuit court orally ruled in favor of the County. Although the circuit court requested the Assistant Commonwealth Attorney (representing the County) to "present an order," no order was ever entered.

On or about March 30, 2007, Root timely filed a motion for a new trial, with a jury.[6] The basis for the motion was that Root had not voluntarily and

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[5] Virginia Code § 3.1-796.115(C) requires that the "procedure for appeal and trial shall be the same as provided by law for misdemeanors." Misdemeanor convictions may be appealed to the circuit court for a trial *de novo*. The "appeal de novo negates the prior proceeding . . . ." *Baker v. Elmendorf*, 271 Va. 474, 479, 628 S.E.2d 358 (2006).

[6] See Virginia Supreme Court Rule 3A:15(c)("The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. *The court shall grant a new trial if it sets aside the verdict for any other reason.*")(emphasis added).

intelligently waived her right to a jury trial,[7] a right afforded her by Virginia Code § 3.1-796.115(C)("Trial by jury shall be as provided in Article 4 (§ 19.2-260 et seq.) of Chapter 15 of Title 19.2"). On April 13, 2007, at the hearing on Root's motion for a new trial (with a jury), after the court indicated that it would grant the motion for the jury trial, the County (by an Assistant Commonwealth Attorney) moved for a non-suit,[8] which

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[7] Virginia Supreme Court Rule 3A:13(b) provides:

> If an accused who has pleaded not guilty in a circuit court consents to trial without a jury, the court may, with the concurrence of the Commonwealth's attorney, try the case without a jury. The court shall determine before trial that the *accused's consent was voluntarily and intelligently given*, and his consent and the concurrence of the court and the Commonwealth's attorney shall be entered of record. (Emphasis added).

[8] A nonsuit "does not involve a decision on the merits, rather, it 'simply [puts] an end to the present action . . . .'" *Sheets v. Castle,* 263 Va. 407, 413, 559 S.E.2d 616, ___ (2002). See also *Williamsburg Peking Corp. v. Kong,* 270 Va. 350, 354, 619 S.E.2d 100, ___ (2005) ("[u]pon the entry of a nonsuit order, the case becomes concluded as to all claims and parties, and nothing remain[s] to be done.")(internal quotations and citations omitted). Further, where a defendant's motion for new trial is granted, a plaintiff may take a nonsuit. See *Ford Motor Company v. Jones,* 266 Va. 404, 407, 587 S.E.2d 579 (2003)(where circuit court's judgment is reversed on appeal and remanded for new trial, "litigants are restored to their original rights as though no previous trial had occurred, including the right to dismiss or nonsuit a case."). The same principle is true of a circuit court granting a new trial; the litigants are restored to their original rights, including the right to nonsuit the case.

the circuit court granted by order entered on April 16, 2007.[9] The County did not refile the action within the six (6) months allowed by Virginia Code § 8.01-229[10] (*i.e.*, the County had until October 16, 2007 to refile) and has not returned any of the ten (10) animals which the general district court (whose orders were annulled by the appeal to the circuit court) had ordered to be made available for adoption, despite the requirement of Virginia Code § 3.1-796.115(D) that animals "*shall be returned to the owner*" (emphasis added) if the court "determines that the animal has been neither abandoned, cruelly treated, nor deprived of adequate care . . . ."[11]

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[9] While the circuit court's order did not expressly state that the motion for a new trial (with a jury) was granted, the circuit court could only have granted the County's motion for a non-suit if the circuit court had granted the motion for a new trial because a non-suit may only be granted "before a motion to strike the evidence has been sustained or before the jury retires from the bar or *before the action has been submitted to the court for decision.*" Virginia Code § 8.01-380(A) (emphasis added).

[10] "If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer."

[11] Upon information and belief, after the seizures of the animals, but prior to the final order of the circuit court non-suiting the case, the County transferred two (2) of the dogs to Michele McCall; one (1) of the dogs to Dianne Lanigan; one (1) of the dogs to Sue Gilbert; purported to consummate the adoption of one (1) of the dogs by Pamela Schmoll; purported to consummate

Proceedings in the Courts Below

On April 22, 2008, Root filed a civil action in the Fairfax County Circuit Court against the County of Fairfax and eight (8) individual defendants, including Colwell, Schmoll, and Bodart, resulting from the seizure and retention of the ten (10) animals not returned after the County non-suited the judicial proceeding. The individual defendants were included as parties because they were necessary parties under Fed.R.Civ.Pro. 19(a) as the animals had been transferred to them by the County.

Count I of the action sought an injunction under Virginia Code § 8.01-620 against the County and the individual defendants ordering the return of the animals as title had not vested in the County.[12] Count II sought damages and injunctive relief, pursuant to 42 U.S.C. § 1983, only against the County for depriving Root of her property without due process in violation of the Fourteenth Amendment to the United States Constitution.

After service of the complaint, Root non-suited the case as to three of the individual defendants (McCall, Lanigan, and Reilly) as the animals which

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the adoption of two (2) of the dogs by Michel Bodart; purported to consummate the adoption of one (1) of the dogs by Sheila Reilly; purported to consummate the adoption of one (1) of the dogs by John Colwell; and purported to consummate the adoption of the horse by Bryant Fletcher.

[12] The law in Virginia "regards animals, however beloved, as personal property," *Kondaurov, supra*, 271 Va at 657.

had been transferred to them were said to have died.

On May 16, 2008, the County removed the case to the United States District Court for the Eastern District of Virginia, pursuant to 28 U.S.C. § 1441 and § 1446, because the district court had original jurisdiction (under 28 U.S.C. § 1331) of the § 1983 claim, and supplemental jurisdiction (under 28 U.S.C. § 1367(a)) over the state law claim (the state law claim was "so related to claims in the action within such original jurisdiction that [it] form[ed] part of the same case or controversy under Article III of the United States Constitution").

On May 22, 2008, three of the individual defendants (Colwell, Schmoll, and Bodart) filed a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6); the County filed a motion to dismiss under Rule 12(b)(6) on May 23, 2008.

At a hearing on June 13, 2008, the district court orally dismissed Count II (the § 1983 claim), and remanded Count I (the state law claim) to the state court. Count II was dismissed because the district court concluded that Root had not been deprived of her property without due process. App. 12a (Hearing Transcript).[13] An Order was entered on June 19, 2008. App. 9a (Order). Root timely filed an appeal of the dismissal of Count II (the § 1983 claim) and the County and the individual defendants subsequently cross-appealed the remand of Count I (the state law

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[13] At the hearing, Root voluntarily dismissed Bryant Fletcher.

claim).

In an unpublished decision of March 26, 2010. the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court dismissing Count II of Root's complaint and remanding Count I to the state court. App. 1a. Root's timely filed petition for rehearing was denied on April 10, 2008. App. 10a. On July 20, 2010, Chief Justice Roberts granted Root's timely motion to extend the time to file this petition until September 23, 2010.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

It is fundamental that a person who has been deprived of property by the state must be afforded procedural due process, which:

> imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

One of those constraints is that "some form of hearing is required before an individual is finally deprived of a property interest." *Mathews*, 424 U.S. at

333. *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306 (1950), stated of the right to a hearing:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and *can choose for himself whether to appear or default, acquiesce or contest.* . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and *afford them an opportunity to present their objections.*

339 U.S. at 314 (emphasis added).

The required hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). See also *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982)("Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged").

Moreover, as a general rule, absent an "extraordinary situation" property cannot be seized "without a *prior* judicial determination that the seizure is justified." *United States v. $8,850,* 461 U.S. 555, 562, n.12 (1983). Such an "extraordinary situation exists when the government seizes items subject to forfeiture." *Id.*

From the above, it is evident that the state, upon seizing property, must affirmatively afford the property owner both adequate notice *and* an opportunity at a hearing to present objections to the reasons for the seizure. Indeed, in emphasizing that the required notice allows the property owner to "choose" whether to "appear" and "contest" the allegations made by the state in its notice, and affords "an opportunity" to present objections, *Mullane* contemplates that it is the duty of the state affirmatively to provide the forum for the hearing and to bear the burden of proving that it has a basis for retaining the seized property.

There is, however, no decision by this Court expressly holding that, when the state seizes property, it is the duty of the state not only affirmatively to provide the forum for a hearing and to bear the burden of proving that it has a basis for retaining the seized property, but, if it does not provide an opportunity for the hearing, to return the property. *Cf. McClendon* v. *Rosetti*, 369 F.Supp. 1391, 1394 (S.D.N.Y. 1974)(where property seized at time of arrest, if government official "wishes to retain property," "he may do so only if he timely institutes a proper suit to justify the further detention").

Several decisions of this Court touch upon this issue, and suggest that, if the state wishes to retain seized property, it may do so only if it timely institutes a proper action and that action results in a final judgment. It is to resolve this issue expressly that this Court should grant this Petition.

In *United States v. $8,850, supra*, this Court recognized that "postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time." 461 U.S. at 562-563. *See also Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 547 (1985)("At some point, a delay in the post-termination hearing would become a constitutional violation."). If a *delay* in instituting a forfeiture proceeding can constitute a violation of due process, then the *complete failure* to institute and prosecute to final judgment a forfeiture proceeding would certainly seem to constitute a violation of due process, requiring the return of the property.

United States v. Parcel of Rumson, N. J., Land, 507 U.S. 111, 126 (1993), emphasized that, "'whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited' (citation omitted)," "'*title is not perfected until judicial condemnation* . . . .'" 507 U.S. at 126 (citation omitted)(emphasis in original). Further, until the Government wins a judgment of forfeiture, "someone else owns the property." 507 U.S. at 127. Thus, one of the lessons of *Parcel of Rumson, N. J., Land* appears to be that the failure to prosecute to final judgment a forfeiture proceeding would constitute a violation of due process, requiring the return of the property.

Most recently, in *Alvarez v. Smith,* 130 S.Ct. 576 (2009), this Court granted certiorari:

> to determine whether Illinois law

> provides a sufficiently speedy opportunity for an individual, whose car or cash police have seized without a warrant, to contest the lawfulness of the seizure.

130 S.Ct. at 578.

Under the Illinois statute at issue, when an officer has seized property without a warrant:

> the relevant law enforcement agency must notify the State's Attorney within 52 days of the seizure; the State's Attorney must notify the property owner of any impending forfeiture within a further 45 days; and, if the owner wishes to contest forfeiture, the State's Attorney must begin judicial forfeiture proceedings within yet a further 45 days.

130 S.Ct. at 579.

This Court, however, found the case moot because "the underlying property disputes have all ended." *Id.* The instant case would provide this Court the opportunity it missed in *Alvarez* to resolve, at least in part, what the limitations of the due process clause are with respect to property seized without a warrant where an applicable statute provides only for a post-seizure judicial proceeding.

In the case at bar, Root was not afforded an opportunity to be heard and to present her objections.

Rather, the County non-suited the action it had initially brought at which Root would have had the opportunity to present her objections in a jury trial. That non-suit put "an end to" (*Sheets*, *supra*, 263 Va. at 413) the civil action for forfeiture of the animals. The County, of course, could have refiled the action within six (6) months, pursuant to Virginia Code § 8.01-229, *supra*, but elected not to do so, thereby effectively not bringing any action at all. Thus, as of October 16, 2007, the County's effort to forfeit Root's animals was at an end. But the County failed to return the animals, thereby permanently depriving Root of her property without any process whatever.

The fact that there had been a hearing in the general district court is of no moment as such a hearing became a legal nullity upon appeal to the circuit court. As explained in *Gemmell v. Svea Fire, Etc., Ins. Co.*, 166 Va. 95, 184 S.E. 457 (1936):

> "Where the effect of an appeal is to transfer the entire record to the appellate court for a retrial as though originally brought therein, the judgment appealed from is completely annulled, and is not thereafter available for any purpose."

166 Va. at 99 (citation omitted).

Further, *Gemmell* adopted the following holdings of other courts:

> "When an appeal is taken by either party, its effect is not only to suspend but

> to destroy the effect of a judgment of a justice. It makes it as though no judgment had been rendered. The cause is considered as still pending, no regard is had to the judgment of the justice, and the rights of the parties are the same as they would be in any other suit pending in the courts of record."
>
> "When an appeal from the judgment of a justice of the peace is properly taken and a return thereto is made, the whole proceedings before the justice become a mere *lis pendens* in the district court. (Citing statute.) *The parties stand in relation to each other there, the same as they did at the commencement of the trial before the justice.*"

166 Va. at 99 (Citations omitted)(emphasis added).

Following *Gemmell*, the Virginia Supreme Court further explained the consequences of an appeal to the circuit court. See *e.g.*, *Gravely v. Deeds,* 185 Va. 662, 664, 40 S.E.2d 175 (1946)("appeal is, in effect, a statutory grant of a new trial" and "annuls the judgment of the trial justice"); *Gaskill v. Commonwealth,* 206 Va. 486, 490, 144 S.E.2d 293 (1965)(an appeal to the circuit court "annuls the judgment of the inferior tribunal as completely as if there had been no previous trial"); and, most recently, *Baker v. Elmendorf,* 271 Va. 474, 479, 628 S.E.2d 358

(2006)("appeal de novo negates the prior proceeding").[14]

In holding that Root had not been deprived of her property without due process, the court of appeals stated:

> Root's contention is that, after the County moved for and was awarded a nonsuit in the circuit court, there was no avenue provided for return of the animals.

App. 5a.

This is not Root's contention as Virginia Code § 3.1-796.115(D) provides that animals "*shall be returned to the owner*" (emphasis added) if the court "determines that the animal has been neither abandoned, cruelly treated, nor deprived of adequate care . . . ." Rather, Root contended that, because the County moved for, and was awarded a nonsuit in the circuit court, the state provided her no forum to contest the retention of the animals, *i.e.*, she was not provided an opportunity for a hearing, a fundamental precept of due process, and her property was not returned. See *e.g.*, *Mathews, supra*, 424 U.S. at 332-33 (1976)(one of the "constraints on governmental decisions which deprive individuals" of property is that

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[14] See also *Buck v. City of Danville*, 213 Va. 387, 388, 192 S.E.2d 758 (1972)("An appeal under Code § 16.1-132 is in effect a statutory grant of a new trial, which annuls the judgment of the inferior court as completely as if there had been no previous trial . . . .")

"some form of hearing is required before an individual is finally `deprived of a property interest") and *Armstrong, supra*, 380 U.S. at 552 (hearing "must be granted at a meaningful time and in a meaningful manner"). Had the County not nonsuited the case, the process provided in Virginia Code § 3.1-796.115(C), including the right to a jury trial, would have been afforded to Root.

The court of appeals concluded that Root was afforded due process because:

> Root had multiple opportunities to arrest the adoption of the animals directed by the general district court's December 22, 2004 ruling and order entered on January 4, 2005. Knowing that the order was to be effective immediately, she did not file for a stay. Root cannot now complain that the order was effectuated. Neither did Root file a motion for stay when she appealed to the state circuit court.

App. 5a.[15]

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[16] The court of appeals refers to "the general district court's December 22, 2004 ruling and order entered on January 4, 2005 . . . ." App. 5a In fact, the Order entered on January 4, 2005 states that the "cause was heard on the 22nd day of December, 2004 . . . ." There is nothing in the record indicating whether the substance of the order was enunciated by the general district court on December 22, 2004 when the matter was heard, so that referring to the "December 22, 2004 ruling" is incorrect. Moreover, in Virginia, "a court speaks through its orders . . . ."

The conclusion that Root was afforded due process because she could have arrested the adoption of the animals as she "kn[ew] that the order was to be effective immediately" overlooks the procedural posture of the case. And, because of state law, Root did not need to file for a motion for stay when she appealed to the state circuit court.

As to the first point, Root in fact did request a stay in the general district court, which was filed on January 3, 2005, but on which the general district court did not act. Further, while Root may have known that the Order entered on January 4, 2005 was effective immediately, she, and the County, also knew that the case could be appealed to the circuit court for trial *de novo* as Virginia Code § 3.1-796.115(C) established that the "procedure for appeal and trial shall be the same as provided by law for misdemeanors" and, on appeal to the circuit court, "[t]rial by jury shall be as provided in Article 4 (§ 19.2-260 et seq.) of Chapter 15 of Title 19.2." Virginia Code § 3.1-796.115(C). Further, it was well-established at that time that an appeal to the circuit court "annuls the judgment of the inferior tribunal as completely as if there had been no previous trial." *Gaskill, supra*, 206 Va. at 480. Indeed, as stated in *Gemmell, supra*, the "'judgment appealed from is completely annulled, and is not thereafter available for any purpose'" and the effect of an appeal is to "'transfer the entire record to the appellate court for a retrial *as though originally brought therein* . . . .'" 166 Va. at 99 (citation

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Waterfront Marine Constr. v. North End 49ers, 251 Va. 417, 427, n.2, 468 S.E.2d 894, ___ (1996).

omitted)(emphasis added).

Accordingly, when Root appealed to the circuit court, the general district court's Order entered on January 4, 2005 (and every other order of the general district court) became a legal nullity *ab initio*, so that whether or not Root filed for a stay in the general district court was of no moment.

As to the second point stated by the court of appeals (that Root did not file a motion for stay when she appealed to the state circuit court), *Gaskill, Gemmell, Gravely,* and *Baker* make plain that a stay when appealing to the state circuit court is unnecessary because the appeal entirely negates the proceeding in the general district court.

The one case cited by the court of appeals in support of its conclusion that Root did not seek to stay the adoption of the animals in the general district court when she could have done so, *Alvin v. Suzuki*, 227 F.3d 107 (3rd Cir. 2000), does not support the court of appeals' conclusion. *Alvin* held that, "to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." 227 F.3d at 116. In the case at bar, Root in fact did avail herself of the processes available to her; she duly appealed the judgment of the general district court and sought a jury trial in the circuit court (as authorized by Virginia Code § 3.1-796.115(C)) to contest the County's depriving her of her animals. But the County nonsuited the case, thereby, in the words of *Alvin*,

making "those processes . . . unavailable . . . ." 227 F.3d at 116.[16] That Root did not seek a stay in the general district court does not mean that she did not avail herself of the processes established by state law; she did avail herself of those processes when she appealed the judgment of the general district court, thereby negating the entire proceeding in the general district court.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

RICHARD E. GARDINER*
Suite 403
3925 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-7276
regardiner@cox.net
Counsel for Petitioner
*Counsel of Record

September, 2010

---

[16] Indeed, the County's nonsuiting of the case denied Root her right to due process as effectively as if no case had ever been initiated. A nonsuit "does not involve a decision on the merits, rather, it 'simply [puts] an end to the present action . . . .'" *Sheets, supra,* 263 Va. at 413.

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1735

LOUISE ROOT

Plaintiff - Appellant

v.

COUNTY OF FAIRFAX; MICHELLE MCCALL; PAMEAL SCHMOLL; MICHEL BODART; DIANNE LANIGAN; SUE GILBERT; SHEILA REILLY; JOHN COLWELL; BRYANT FLETCHER,

Defendants - Appellees

No. 08-1794

LOUISE ROOT

Plaintiff - Appellee

v.

COUNTY OF FAIRFAX; MICHELLE MCCALL; PAMEAL SCHMOLL; MICHEL BODART; DIANNE

LANIGAN; SUE GILBERT; SHEILA REILLY; JOHN COLWELL; BRYANT FLETCHER,

Defendants - Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:08-cv-00498-CMH-TCB)

Submitted: March 10, 2010 Decided: March 26, 2010

Before WILKINSON, KING, and SHEDD, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

Richard E. Gardiner, Fairfax, Virginia, for Appellant/Cross-Appellee. David P. Bobzien, County Attorney, Peter D. Andreoli, Jr., Deputy County Attorney, Karen L. Gibbons, Senior Assistant County Attorney, Fairfax, Virginia; David J. Fudala, Fairfax, Virginia, for Appellees/Cross-Appellants.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Louise Root appeals from the district court's order dismissing her 42 U.S.C. § 1983 (2006) complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. The Appellees filed a cross-appeal of the portion of the order remanding the supplemental state law claim to the state court. Root filed a motion to dismiss the cross-appeal. For the reasons below, we affirm the district court's order.

Louise Root filed a civil action in the Fairfax County Circuit Court against the County of Fairfax (County) and eight individual defendants, arising from the seizure of nine dogs and one horse from Root by County animal control officers. The individual defendants were sued because ownership of the animals was transferred to them by adoption from the County. The action contained one count seeking damages under 42 U.S.C. § 1983 against the County for depriving Root of her property without due process under the Fourteenth and Fifth Amendments. The only remaining count sought an injunction against the County and the individual defendants ordering the return of the animals to Root.

We review de novo the district court's rulings on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). See *Philips v. Pitt County Mem'l Hosp.*, 572 F.3d 176, 179-80 (4th Cir.2009). To survive a Rule 12(b)(6) motion, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Generally, when ruling on a Rule 12(b)(6) motion, "a judge must

accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted).

Under the Due Process Clause of the Fifth Amendment, no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Procedural due process requires, at a minimum, fair notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In order to determine whether an individual has received fair notice, we "must examine the relevant facts of each case." *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir.1997). Beyond the minimum requirements of notice and an opportunity to be heard, due process is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

To state a successful claim for failure to provide due process, "a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir.2000) (reviewing procedural due process claim where plaintiff did not follow formal grievance procedure provided).

Keeping this flexibility of the due process requirements in mind, we conclude that the procedural due process given to Root was adequate. Root was notified of the allegations of animal neglect against her in accordance with Va.Code Ann. § 3.1-796.115(A) (2007). She does not contend that the process provided

in the Code of Virginia was inadequate. Root's contention is that, after the County moved for and was awarded a nonsuit in the circuit court, there was no avenue provided for return of the animals. However, Root had multiple opportunities to arrest the adoption of the animals directed by the general district court's December 22, 2004 ruling and order entered on January 4, 2005. Knowing that the order was to be effective immediately, she did not file for a stay. Root cannot now complain that the order was effectuated. Neither did Root file a motion for stay when she appealed to the state circuit court. We conclude the district court did not err in holding that there was no violation of procedural due process under these circumstances.

In its cross-appeal, the County argues that the district court erred in remanding the state claim to state court. The County asserts this count failed to state a claim for relief as the County was compelled by a general district court order to place the animals for adoption. Therefore, the County argues that the count should have been dismissed instead of remanded. The County maintains that the general district court order directing that the County place the animals was a final order and therefore is dispositive on the question of whether Root is now entitled to the animals. The County further argues that the state law count did not set forth a cause of action, but sought injunctive relief only and relied entirely on the § 1983 count being a viable cause of action. The County concedes, however, that the state law count arguably states a claim in the nature of detinue, but contends a claim for detinue would not be successful because, again, the County

had lawfully placed the animals. Root continues to argue that the County did not have the right to place the animals for adoption because the general district court order was not a final order and title to the animals had not passed from Root.

Appellate review of remand orders is permitted when it is clear that the district court's order was based, not on a belief that it lacked subject matter jurisdiction over the removed action, but because it declined to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c) (2006). *See Jamison v. Wiley*, 14 F.3d 222, 233 (4th Cir.1994); see also *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 606 n. 16 (4th Cir.2002) (explaining that, under "well-settled precedent," remands based on § 1367(c) are appealable final orders under 28 U.S.C. § 1291 (2006)); *Hinson v. Norwest Fin. South Carolina, Inc.*, 239 F.3d 611, 615 (4th Cir.2001) (finding that court had jurisdiction to review remand order that was "not derived from § 1447(c), but is inherent in the authority of a district court to decline to exercise jurisdiction under 28 U.S.C. § 1367(c)").

Here, the district court specifically declined to exercise its jurisdiction under § 1367(c). The district court's ruling from the bench demonstrates that the court, having dismissed the only federal claim, believed it had the discretionary authority to exercise supplemental jurisdiction over the remaining state law claim, but chose not to do so. Accordingly, because the district court did not remand for lack of subject matter jurisdiction, or because of a defect in the removal procedure, this court has jurisdiction to review the

district court's remand decision.

The district court's remand order is reviewed for abuse of discretion. *Hinson*, 239 F.3d at 617. Under § 1367(c), a district court may decline to exercise its supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially dominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it had original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Here, the court had dismissed the sole claim over which it had original jurisdiction. See 28 U.S.C. § 1367(c)(3). There is nothing in the record to suggest that it was an abuse of discretion to decline to exercise supplemental jurisdiction. We therefore also affirm the portion of the district court's order remanding the state law claim to the state court for further proceedings. We deny Root's motion to dismiss the cross-appeal.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LOUISE ROOT	)	
	)	
Plaintiff	)	
v.	)	Civil Action No. 1:08cv498
	)	
COUNTY OF FAIRFAX, et al.,	)	
	)	
	)	
Defendants	)	
	)	

ORDER

This case is before the Court on Defendants' Motion to Dismiss. Plaintiff's Complaint, filed in Circuit Court for the County of Fairfax, Virginia, alleges state causes of action and a federal claim pursuant to 42 U.S.C. § 1983. Defendants removed. For the reasons stated from the bench it is hereby

ORDERED that the 42 U.S.C. § 1983 claim is DISMISSED as to all of the Defendants and the remaining state claims are REMANDED to the Circuit Court for the County of Fairfax, Virginia.

/s/
CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
June 19, 2008

FILED: April 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1735 (L)
(1:08-cv-00498-CMH-TCB)

LOUISE ROOT

Plaintiff - Appellant

v.

COUNTY OF FAIRFAX; MICHELLE MCCALL; PAMEAL SCHMOLL; MICHEL BODART; DIANNE LANIGAN; SUE GILBERT; SHEILA REILLY; JOHN COLWELL; BRYANT FLETCHER

Defendants - Appellees

No. 08-1794
(1:08-cv-00498-CMH-TCB)

LOUISE ROOT

Plaintiff - Appellee

v.

COUNTY OF FAIRFAX; MICHELLE MCCALL; PAMEAL SCHMOLL; MICHEL BODART; DIANNE LANIGAN; SUE GILBERT; SHEILA REILLY; JOHN COLWELL; BRYANT FLETCHER,

Defendants - Appellants

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wilkinson, Judge King, and Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

LOUISE ROOT	)	
	)	
Plaintiff	)	Docket No. 1:08cv498
	)	Alexandria, Virginia
	)	
COUNTY OF FAIRFAX, et al.,	)	June 13, 2008
	)	10:02 a.m.
	)	
Defendants	)	
	)	

TRANSCRIPT OF HEARING

BEFORE THE HONORABLE CLAUSE M. HILTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
Richard E. Gardiner, Esq.
10560 Main Street
Suite 404
Fairfax, Virginia 22030

For the Defendants:
Karen L. Gibbons, Esq.
Office of the
County Attorney
12000 Government Center
Parkway, Suite 549
Fairfax, Virginia 22035

David J. Fudala, Esq.
4010 University Drive
Second Floor
Fairfax, Virginia 22030

Court Reporter: Tracy L Westfall, RPR, CMRS, CCR

(EXCERPTS)

THE COURT: This may be very simple for me because I don't find a due process violation alleged here. Why don't I just let you-all go back to Fairfax and sort out who gets the animals.

MR. GARDINER: We would note our objection to that, Your Honor. We think there is a due process violation, but if that's the Court's ruling --

THE COURT: I mean, you appealed the case. You may have filed any motion you wanted to in regard to the return of the property. You could have done it at the time. As your opponent says, you could have filed a counterclaim. You could have filed any number of things -- or your client could have filed any number of things at that time at any time during the proceeding. As soon as they moved to nonsuit the case, you could have filed something right at that time. If you didn't get a hearing in regard to those animals, it's your own fault. You were right there.

MR. GARDINER: Your Honor, I respectfully disagree. In a forfeiture case, the government has the duty of going – taking you to the –

THE COURT: I don't care about the forfeiture case. You knew they had the animals, your client knew they had the animals, the case is there, it's being nonsuited. She wants the animals back, all she has to do is ask for it.

MR. GARDINER: Again, with all due respect, at that point –

THE COURT: And she had the due process available for her to do it.

MR. GARDINER: The County at that point had the duty to return the animals, the statute clearly says that, and they didn't do that. That's what's the due process violation. Tere's no burden on a property –

THE COURT: How does that become a due process violation? Anytime a county is obligated to do something that they decide that they don't have the obligation to do, you have the right to go to court and ask for that. Now, if you don't have a provision to go to court and ask for it, then you may be deprived of due process, but your client had the due process. The court was there all the time. Could have gone and asked at any time.

MR. GARDINER: Your Honor, again, I respectfully disagree that that's what the law –

THE COURT: Well, you're welcome to disagree with me, but I don't find any due process violation here. I don't see any reason why I should get involved in where these animals go. That's a matter that ought to

be decided out in Fairfax, it seems to me. I may get something in writing that sets out what I'm thinking a little more clearly than the way I've said it, but I find these allegations here contain no due process claim that can go forward. I'm going to dismiss this Count 2, the 1983 claim, and I'm going to dismiss Count 1 -- well, I don't know whether it's been removed. I guess I can remand it.

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(2)

Supreme Court, U.S.
OCT 25 2010
OFFICE OF THE CLERK

Docket No. 10-406

In the Supreme Court of the United States

Louise Root,

Petitioner,

v.

County of Fairfax, Pameal Schmoll, Michel Bodart, Sue Gilbert & John Colwell,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David P. Bobzien, County Attorney
James E. Wilcox, Jr., Assistant County Attorney*
Office of the County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421
james.wilcox@fairfaxcounty.gov
**Counsel of Record*

QUESTION PRESENTED FOR REVIEW

Was the United States Court of Appeals for the Fourth Circuit correct in affirming the determination of the United States District Court for the Eastern District of Virginia that Louise Root was not denied procedural due process?

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STATEMENT OF THE CASE

On December 13, 2004, Fairfax County, Virginia (County), Animal Control Officers seized seventeen (17) of Louise Root's (Root) dogs and petitioned the Fairfax County General District Court (general district court) "pursuant to [Va. Code Ann.] § 3.1-796.115(A),[1] for a hearing to determine whether the animals 'had been abandoned, ha[d] been cruelly treated, or [were] suffering from an apparent violation of [Chapter 27.4, Comprehensive Animal Laws] that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health.'" [J.A. at 6 ¶ 4.][2] Similarly, on December 15, 2004, County Animal Control Officers seized one horse from Root and petitioned the general district court for a hearing pursuant to Va. Code Ann. § 3.1-796.115(A) (Supp. 2004). [J.A. at 7 ¶ 5.]

Pursuant to Va. Code Ann. § 3.1-796.115(A), a hearing was held in the general district court on December 22, 2004, to determine whether the animals had been abandoned, had been cruelly treated, or had not been provided with adequate care.[3] After the hearing, the "general district court

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[1]Va. Code Ann. § 3.1-796.115 was repealed by 2008 Va. Acts, ch. 510, and is now Va. Code Ann. § 3.2-6569 (2008).

[2]Citations to the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit are cited as "J.A. at [page number]."

[3]While proceedings pursuant to Va. Code Ann. § 3.1-796.115 are civil in nature, the County is represented by the Commonwealth's Attorney and the burden of proof is beyond a reasonable doubt. Va. Code Ann. § 3.1-796.115(C) (Supp. 2004).

ordered, *inter alia*, that seven (7) of the dogs be returned to Root and that the remaining ten (10) animals be 'made available for adoption immediately.'" [J.A. at 7 ¶ 6.] The general district court continued the matter until January 19, 2005, for a review hearing for the "court to determine, *inter alia*, 'if progress has been made with the adoptions . . . .'" *Id.* An order to this effect was entered on January 4, 2005, and the court purported to vacate it on December 15, 2005, for unknown reasons. *Id.* Root alleged that the general district court did not enter a final order in the case until February 22, 2006, from which Root appealed to the Fairfax County Circuit Court (circuit court) pursuant to Va. Code Ann. § 3.1-796.115(C). [J.A. at 7 ¶¶ 7-8.]

On July 6, 2006, a bench trial was held in the circuit court, after which the court orally ordered "'that the animals be sold by the local governing body, humanely destroyed or disposed of by sale or gift . . . .'" [J.A. at 8 ¶9.] No order reflecting the circuit court's ruling was ever entered. [J.A. at 8 ¶10.]

After more than nine months, on March 20, 2007, Root's then-counsel filed a motion requesting a new trial on the grounds that Root had not knowingly and voluntarily waived her right to a trial by jury. [J.A. at 8 ¶11.] At the hearing on Root's motion for a new trial, the Commonwealth's Attorney moved for a nonsuit, which was granted by the circuit court without objection from Root's counsel, and an order nonsuiting the case was entered on April 16, 2007. [J.A. at 8 ¶12.]

On April 22, 2008, Root filed a Complaint in the circuit court against the County and eight individuals, including Pamela Schmoll (Schmoll),[4] Michel Bodart (Bodart), Sue Gilbert (Gilbert), and John Colwell (Colwell). [J.A. at 5-11.] In her Complaint, Root alleged that because the County never obtained a final judgment order of forfeiture to the nine dogs and one horse, title did not vest in the County and, therefore, the adoptions were void. [J.A. at 9 ¶ 15-16.] In Count I of her Complaint, Root sought an injunction pursuant to Va. Code Ann. § 8.01-620 (2008) ordering the return of the nine dogs and one horse to her. [J.A. at 9 ¶ 18.] In Count II of the Complaint, Root asserted a cause of action under 42 U.S.C. § 1983, claiming that the County had deprived her of due process under the Fourteenth Amendment to the United States Constitution by retaining and adopting out the nine dogs and one horse without acquiring title. [J.A. at 9 ¶ 22.] Root sought damages in the amount of $300,000 from the County as well as costs and attorney's fees. [J.A. at 10.]

On May 14, 2008, Root filed a motion to nonsuit defendants Michelle McCall, Dianne Lanigan, and Sheila Reilly.

On May 16, 2008, the County removed Root's Complaint to the United States District Court for the Eastern District of Virginia, Alexandria Division (District Court).

---

[4]Schmoll's first name is correctly spelled Pamela, not Pameal.

On June 13, 2008, the District Court granted the County's motion to dismiss Count II pursuant to Fed. R. Civ. P. 12(b)(6). The District Court denied the motion to dismiss Count I pursuant to Fed. R. Civ. P. 12(b)(6) filed by the County, Colwell, Schmoll, and Bodart, and instead remanded it to the circuit court. On June 19, 2008, the district court entered an order dismissing Count II and remanding Count I to the circuit court.

On July 2, 2008, Root appealed the District Court's dismissal of Count II to the United States Court of Appeals for the Fourth Circuit (Fourth Circuit). [J.A. at 33.] On July 16, 2008, the County, Schmoll, Bodart, and Colwell cross-appealed the remand of Count I to the Fourth Circuit.

In an unpublished opinion dated March 26, 2010, the Fourth Circuit affirmed the District Court's order. The Fourth Circuit found that "the procedural due process given to Root was adequate." [App. at 4a.][5]

REASON FOR DENYING THE PETITION

To provide procedural due process, a government entity generally cannot deprive a person of his or her property without first providing him or her with notice of an impending deprivation and an opportunity to be heard. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). These requirements of notice and opportunity to be heard are interrelated.

---

[5]Citations to the Appendix filed as part of Root's Petition are cited as "App. at [page number]."

As this Court has explained, the "right to be heard has little reality or worth unless one is informed that the matter [affecting one's property rights] is pending and can choose for himself [or herself] whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In deciding whether a person has received sufficient notice and an adequate opportunity to be heard, "courts must consult the entire panoply of predeprivation and post-deprivation" remedies provided to the person by a government entity in the particular case. *Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990). Contrary to Root's argument at page 15 of her Petition, as more fully explained below, Root was given the opportunity to be heard, was in fact heard, and was able to present her objections to the seizure of her animals pursuant to Va. Code Ann. § 3.1-796.115, after which the general district court ordered that seven of the seized animals be returned to her.

Root's animals were seized by County Animal Control Officers on December 13 and 15, 2004, pursuant to Va. Code Ann. § 3.1-796.115. That code section provided in pertinent part that:

> A. *Any . . . animal control officer may lawfully seize and impound any animal that has been abandoned, has been cruelly treated, or is suffering from an apparent violation of this chapter that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health.*

. . . .

> *Upon seizing or impounding an animal, the . . . animal control officer shall petition the general district court in the city or county wherein the animal is seized for a hearing.* The hearing shall be not more than ten business days from the date of the seizure of the animal. *The hearing shall be to determine whether the animal has been abandoned, has been cruelly treated, or has not been provided adequate care.*
>
> B. *The . . . animal control officer shall cause to be served upon the person with a right of property in the animal or the custodian of the animal notice of the hearing . . . .*

(Emphasis added.) Root was served with the petitions and a hearing was held in the general district court on December 22, 2004, which was within 10 business days from when the animals were seized, as required by Va. Code Ann. § 3.1-796.115(A).

The purpose of the hearing on December 22, 2004, was to determine whether the animals seized from Root had been abandoned, cruelly treated, or not provided with adequate care. Va. Code Ann. § 3.1-796.115(A). At the hearing on December 22, 2004, the Commonwealth's Attorney was required to prove the case *beyond a reasonable doubt* pursuant to Va. Code Ann. § 3.1-796.115(C). Va. Code Ann. § 3.1-796.115(D) (Supp. 2004) provided the general

district court with the following authority upon conclusion of the hearing:

> If the court determines that the animal has been neither abandoned, cruelly treated, nor deprived of adequate care, the animal shall be returned to the owner. *If the court determines that the animal has been abandoned, cruelly treated, or deprived of adequate care, then the court shall order that the animal be*: (i) sold by a local governing body; (ii) humanely destroyed, or disposed of by sale or gift to a federal agency, state-supported institution, agency of the Commonwealth, agency of another state, or a licensed federal dealer having its principal place of business located within the Commonwealth; (iii) delivered to any local humane society or shelter, or to any person who is a resident of the county or city where the animal is seized or an adjacent county or city in the Commonwealth and who will pay the required license fee, if any, on such animal; or (iv) delivered to the person with a right of property in the animal as provided in subsection E.

(Emphasis added.)

At the conclusion of the hearing on December 22, 2004, "the general district court ordered, *inter alia*, that seven (7) of the dogs be returned to Root and that the remaining ten (10)

animals be 'made available for adoption immediately.'" [J.A. at 7 ¶ 6.] As to the ten animals that were to be made available for adoption immediately, the general district court found, beyond a reasonable doubt, that such animals were abandoned, cruelly treated, or deprived of adequate care. As to the seven dogs that were to be returned to Root, the general district court did not find that such animals were abandoned, cruelly treated, or deprived of adequate care, and ordered those animals to be returned to Root. The general district court continued the matter until January 19, 2005, for a review hearing for the "court to determine, *inter alia*, 'if progress has been made with the adoptions . . . .'" *Id.*

A plain reading of Root's Complaint reveals that she received all of the process she was due under the Fourteenth Amendment. Root's animals were seized by Animal Control Officers on December 13, 2004, and December 15, 2004, pursuant to Va. Code Ann. § 3.1-796.115(A). [J.A. at 6-7, Compl. ¶¶ 4, 5.] As required by Va. Code Ann. § 3.1-796.115(B) (Supp. 2004), Root was served with the petitions and a hearing was held within 10 business days of the seizures, on December 22, 2004, as required by Va. Code Ann. § 3.1-796.115(A). [J.A. at 7, Compl. ¶ 6.] After the hearing, the general district court ordered "that seven (7) of the dogs be returned to Root and that the remaining ten (10) animals be 'made available for adoption immediately.'" [J.A. at 7, Compl. ¶ 6.]

When Root appealed the February 22, 2006, order to the circuit court, she had yet another opportunity to be heard and was, in fact, present with

counsel and heard on July 6, 2006, after which the circuit court orally ordered "'that the animals be sold by the local governing body, humanely destroyed or disposed of by sale or gift . . . .'" [J.A. at 8, Compl. ¶ 9.] Even assuming that Root did not knowingly and voluntarily waive her right to a jury trial as provided for in Va. Code Ann. § 3.1-796.115(C), it is well-established that violations of state law cannot provide the basis for a due process claim. *Clark v. Link*, 855 F.2d 156, 163 (4th Cir.1988).

Root makes the argument that because she exercised her right to appeal to the circuit court, her appeal voided the proceedings in the general district court which, therefore, led to her being deprived of due process by the County. In making this argument, Root cites *Cemmell v. Svea Fire and Life Insurance Co.*, 166 Va. 95, 184 S.E. 457 (1936), *Gravely v. Deeds*, 185 S.E. 662, 40 S.E.2d 175 (1946), *Gaskill v. Commonwealth*, 206 Va. 486, 144 S.E.2d 293 (1965), and *Baker v. Elmendorf*, 271 Va. 474, 628 S.E.2d 358 (2006), in support of her argument that the finding of the general district court is a nullity and may not be considered in this case. Root's reliance on these cases is misplaced because none of these cases hold that upon an appeal to a circuit court from a general district court the entire proceedings in the general district court are a legal nullity. These cases specifically held that the entire proceedings in the general district court remain – only the judgment appealed from is annulled by the appeal.

In *Baker*, the Virginia Supreme Court held that "[w]henever a defendant exercises his rights under Code § 16.1-132 and a conviction in the general district court is appealed, *the fact of that conviction is*

not admissible in the appeal or in a subsequent civil proceeding." *Id.* at 479, 628 S.E.2d at 362 (emphasis added). The fact that the judgment of the general district court is not admissible in a subsequent appeal to circuit court or in a civil proceeding does not negate the fact that in this case Root had notice and an opportunity to be heard in the general district court and in fact, was heard on December 22, 2004.

Moreover, in reaching its decision in *Baker*, the Virginia Supreme Court relied on its earlier decision in *Santen v. Tuthill*, 265 Va. 492, 578 S.E.2d 788 (2003), where it recognized that it has:

> Draw[n] a distinction between a guilty plea, which forms the basis of a district court's judgment, and a defendant's statements made while testifying before the district court. *That testimony, unlike a guilty plea, is not "wiped out" by an appeal and is, therefore, admissible in the subsequent trial of the case.*

Santen, 265 S.E.2d at 497, 578 S.E.2d at 791. Thus, just as testimony before the general district court is not "wiped out" and is admissible in a *de novo* appeal to circuit court, the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, in the general district court is also not "wiped out" by her appeal to the circuit court. Accordingly, Root's appeal to the circuit court could not and did not void the proceedings in the general district court, nor does it in any way vitiate the fact that she had been given notice and an opportunity to be heard.

Once the County seized Root's animals, it met its burden by petitioning the general district court for a hearing pursuant to Va. Code Ann. § 3.1-796.115(A) and giving Root notice of the same. [J.A. at 6, Compl. ¶¶ 4-5.] Such a hearing was held on December 22, 2004, at which time Root had the opportunity to contest and, in fact, did contest the basis for the retention of her animals. After the hearing, seven of Root's animals were returned to her. [J.A. at 7, Compl. ¶ 22.] Pursuant to the general district court's ruling on December 22, 2004, and order of January 4, 2005, the County made the remaining animals available for adoption "immediately." Under these facts, there was no due process violation, and the Fourth Circuit correctly affirmed the district court's dismissal of Count II. For the reasons set forth herein, the County respectfully prays that this Court deny Root's Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the County respectfully requests that the Court deny the petition.

Respectfully submitted,

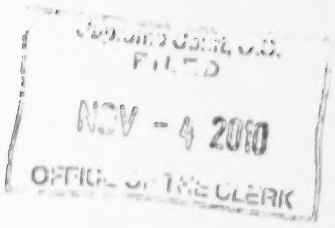
COUNTY OF FAIRFAX

David P. Bobzien
County Attorney

By: _____

James E. Wilcox, Jr.
Assistant County Attorney
Counsel of Record

No. 10-406



IN THE
SUPREME COURT OF THE UNITED STATES

LOUISE ROOT,

Petitioner

v.

COUNTY OF FAIRFAX, PAMEAL SCHMOLL, MICHEL BODART, SUE GILBERT & JOHN COLWELL

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD E. GARDINER*
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
(703) 352-7276
regardiner@cox.net
Counsel for Petitioner
**Counsel of Record*

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The Case Presents A Novel Question Concerning Due Process Because The Proceeding In Which Root Was Purportedly Afforded Due Process Was Nullified *Ab Initio*

1. The County contends that:

> Root was given the opportunity to be heard, was in fact heard, and was able to present her objections to the seizure of her animals pursuant to Va. Code Ann. § 3.1-796.115 . . . .

Brief In Opposition To Petition For Writ Of Certiorari (hereinafter "Opp.") 5.

The County then spends the next three pages of its Opposition (pages 6-8) detailing the procedures followed by the general district court, concluding that these procedures afforded Root "all of the process she was due under the Fourteenth Amendment." Opp. 8.

This argument only serves to emphasize the reason this Court should grant Root's petition. If the process in the general district court was all the process Root received, she did not receive the process she was due under the Fourteenth Amendment because of the subsequent procedures established by Virginia law, *i.e.*, the right to appeal for a trial *de novo* in the circuit court (which annuls the proceedings, including any orders, in the general district court).

The provision under which the proceedings against Root were brought, Virginia Code § 3.1-796.115(C),

requires that the "procedure for appeal and trial shall be the same as provided by law for misdemeanors." The provisions concerning appeal and trial for misdemeanors are Virginia Code § 16.1-132 and Virginia Code § 16.1-136. Virginia Code § 16.1-132 provides:

> Any person convicted in a district court of an offense not felonious shall have the right, at any time within ten days from such conviction, and whether or not such conviction was upon a plea of guilty, to appeal to the circuit court.

Virginia Code § 16.1-136 provides in pertinent part:

> Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court.

In *Baker v. Elmendorf*, 271 Va. 474, 628 S.E.2d 358 (2006), the Virginia Supreme Court summarized these statutes as follows: the "appeal de novo negates the prior proceeding . . . ." 271 Va. at 479.

To support its position that the process Root received in the general district court was all the process she was due, the County argues that Virginia law does not "hold that upon an appeal to a circuit court from a general district court the entire proceedings in the general district court are a legal

nullity." Opp. 9. According to the County, the case law holds only that "the entire proceedings in the general district court remain – only the judgment appealed from is annulled by the appeal." Opp. 9.

While not an accurate summary of the well-established case law (as discussed *infra*), even if it were accurate, the County's argument effectively concedes that Root was deprived of her property without due process because the judgment of the general district court was annulled. That is, there being no judgment authorizing the County to retain Root's property, the County was bound to return the property. But it is undisputed that it failed to do so. Accordingly, by its own admission, the County has deprived Root of her property without due process as it has retained her property following the annulment of the judgment, without any further process.

It is because of this unique issue -- the annulment of the judgment without any further process -- not decided by any of this Court's previous due process decisions,[1] that this Court should grant the petition -- to determine whether failure to return property after the judgment in the statutorily mandated proceeding

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[1] *United States v. Parcel of Rumson, N. J., Land*, 507 U.S. 111, 126 (1993), noted that, "'whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited' (citation omitted)," "'*title is not perfected until judicial condemnation* . . . .'" 507 U.S. at 126 (citation omitted)(emphasis in original). Further, until the Government wins a judgment of forfeiture, "someone else owns the property." 507 U.S. at 127.

has been annulled is a violation of the Fourteenth Amendment's due process clause.

2. The state case law does more than merely establish that only the judgment appealed from is annulled by the appeal.

As discussed, *supra*, Virginia Code § 16.1-132 and Virginia Code § 16.1-136 provide for an appeal to the circuit court, which is heard *de novo*. Further, as noted, *supra*, the Virginia Supreme Court held that the "appeal de novo negates the prior proceeding . . . ." *Baker*, *supra*, 271 Va. at 479. Moreover, *Baker* reiterated the Court's prior decisions in *Santen v. Tuthill*, 265 Va. 492, 578 S.E.2d 788 (2003) and *Gaskill v. Commonwealth*, 206 Va. 486, 144 S.E.2d 293 (1965).

In *Gaskill*, the Court held that the appeal to circuit court "annuls the judgment of the inferior tribunal *as completely as if there had been no previous* ***trial***." 206 Va. at 490 (emphasis added). Thus, *Gaskill* made clear that, when the Court spoke of annulling the judgment, it included nullification of the trial, *i.e.*, the entire proceeding, as if the entire general district court proceeding had not happened. See also *Gemmell v. Svea Fire, Etc., Ins. Co.*, 166 Va. 95, 99, 184 S.E. 457, ____ (1936)(when appeal is taken, the "cause is considered as still pending").

Similarly, in *Santen*, the Court held that "an appeal under Code § 16.1-132 'annuls or wipes out' a guilty plea entered in the district court . . . ." 265 Va. at 497. Thus, again, not only is the judgment

annulled, but the *proceeding* itself is annulled *ab initio* because the proceeding was the guilty plea.

The County asserts that, in *Baker*:

> the Virginia Supreme Court held that "[w]henever a defendant exercises his rights under Code § 16.1-132 and a conviction in general district court is appealed, *the fact of that conviction is not admissible in the appeal or in a subsequent civil proceeding*." [*Baker*] at 479, 628 S.E.2d at 362. (emphasis added).

Opp. 9-10.[2]

While not an inaccurate quotation from *Baker*, the holding of *Baker* was not limited to the "fact of" the conviction. First, as noted above, *Baker* more broadly held that an "appeal de novo negates the prior *proceeding* . . . ." 271 Va. at 479 (emphasis added). Second, the context within which the quotation relied upon by the County was made was *Baker*'s rejection of:

> the Elmendorfs' remaining argument that, regardless of these cases and statutory changes, *Ricketts* [v. *v. J.G. McCrory Co.* 138 Va. 548, 121 S.E. 916 (1924)] should still control this case because an action for malicious prosecution requires an examination of the judicial history of the criminal charge.

271 Va. at 480.

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[2] The quotation is actually at 271 Va. at 480.

The Virginia Supreme Court responded to that narrow argument by stating:

> Whenever a defendant exercises his rights under Code § 16.1-132 and a conviction in general district court is appealed, the fact of that conviction is not admissible in the appeal or in a subsequent civil proceeding.

271 Va. at 480.

Thus, consistent with previous holdings of the Virginia Supreme Court, *Baker* did not limit its holding to whether the fact of a conviction in the general district court, which is appealed for a trial *de novo*, is admissible in the appeal or in a subsequent civil proceeding. Rather, *Baker* made clear that the "appeal de novo negates the prior proceeding . . . ." 271 Va. at 479.

3. The County contends that, when Root appealed the February 22, 2006, order to the circuit court:

> she had yet another opportunity to be heard and was, in fact, present with counsel and heard on July 6, 2006, after which they circuit court orally ordered "'that the animals be sold by the local governing body, humanely destroyed or disposed of by sale or gift . . . .'"

Opp. 8-9.

The County omits the critical facts that there was no final judgment in the circuit court (so that the

proceeding was not complete) and that the County (through the Commonwealth Attorney) non-suited the case in the circuit court, so that, in effect, there was *no* proceeding in the circuit court. See *e.g.*, *Sheets v. Castle,* 263 Va 407, 413, 559 S.E.2d 616, ___ (2002)(nonsuit "does not involve a decision on the merits, rather, it 'simply [puts] an end to the present action'"). In light of the non-suit, Root effectively received no meaningful process whatever in the circuit court, and was denied her right to a jury trial.

4. The County asserts:

> [J]ust as testimony is not "wiped out" and is admissible in a *de novo* appeal to circuit court, the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, in the general district court is also not "wiped out" by her appeal to the circuit court.

Opp. 10.

The County relies upon the following statement in *Santen, supra*:

> We draw a distinction between a guilty plea, which forms the basis of a district court's judgment, and a defendant's statements made while testifying before the district court. That testimony, unlike a guilty plea, is not "wiped out" by an appeal and is, therefore, admissible in the subsequent trial of the case.

265 Va. at 497.

But the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, was, analogous to a guilty plea, what "form[ed] the basis of [the] district court's judgment . . . ." 265 Va. at 497. Indeed, had Root not had notice and opportunity to be heard, there could have been no judgment. Thus, under *Santen*, as well as *Baker* and *Gaskill*, the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, was "wiped out" by the appeal to the circuit court.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

RICHARD E. GARDINER*
Suite 403
3925 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-7276
regardiner@cox.net
Counsel for Petitioner
**Counsel of Record*

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